ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF TEXAS

STEPHEN E. JONES, et al.,

Civil Action No. 3:00-CV-2543-D

Plaintiffs

v.

GOVERNOR GEORGE W. BUSH, et al.,

Defendants.

/

AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFFS' COMPLAINT AND REQUEST FOR PERMANENT INJUNCTIVE RELIEF

LAWRENCE A. CAPLAN, ESQ. AND
CONCERNED CITIZENS FOR THE
UPHOLDING OF OUR NATIONAL
CONSTITUTION (CCUNC)
2200 Corporate Drive, Suite 314
Boca Raton, Florida 33431
Telephone: 561.988.6009
Facsimile: 561.982.7074
E-Mail: Intltaxcorplaw@aol.com

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LAWRENCE A. CAPLAN, an attorney licensed to practice before the State Bars of Florida, California and Oregon, as well as before the U.S. District Court for the Southern District of Florida and the United States Tax Court, on behalf of himself as a U.S. citizen, as well as on behalf of Concerned Citizens for the Upholding of our National Constitution (CCUNC), a national group of concerned U.S. citizens from over thirty-five states of these United States, hereby files this Amicus Curiae Brief in Support of Plaintiffs' Complaint and Request for Declaratory Relief against Defendants, and in support of same states as follows:

1. Amicus Curiae, Lawrence A. Caplan is a citizen of the United States of America and the Concerned Citizens for the Upholding of our National Constitution (CCUNC), is a national group composed of U.S. citizens from over thirty-five states. Because of the great legal and constitutional significance of the matter before this honorable Court, we respectfully ask this Court to accept and take into full consideration the following legal arguments and authorities which

bear directly on the matters at hand, in the rendering of its final decision on the merits of this action.

2. On November 7, 2000, the United States presidential election was held throughout the U.S. In the course of the election, the Republican candidates for President and Vice-President, GEORGE W. BUSH and RICHARD CHENEY, received the largest amount of popular votes in the state of Texas, which should, under normal circumstances, earn them all thirty-two (32) electoral votes of the state of Texas under the rules of the U.S. Electoral College.

3. The Twelfth Amendment to the Constitution of the United States of America ("Twelfth Amendment") states as follows:

> "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, *one of whom, at least, shall not be an inhabitant of the same state with themselves...."* (italics added)

4. GEORGE W. BUSH ("Bush") is the present Governor of Texas, and as such, is clearly a resident, as well as inhabitant of the state of Texas.

5. RICHARD B. CHENEY ("Cheney") has resided in the state of Texas for approximately the last seven years, owns a primary residence in the city of Dallas (Highland Park) upon which he and his wife have held a state homestead tax exemption from the years 1995 through 2000, has been employed with Halliburton Corporation, which is based in Dallas, since at least 1995, and has worked primarily out of their Dallas office during that period. Furthermore, Cheney's spouse, Lynne Cheney has resided with him in the state of Texas throughout this period of time. In addition, all federal tax returns filed by Cheney through tax year 1999 indicate that he considers himself to be both a

resident and inhabitant of the state of Texas. On November 16, 2000, nine days after the recent Presidential election, Cheney listed his Dallas home for sale on the Dallas Metropolitan Real Estate Listing Service ("Dallas MLS"), but to date has not entered into a contract for sale as to the subject property.

6. Just prior to his being announced as Bush's selection as the Republican vice-presidential nominee this past July, Cheney returned to his previous "home state" of Wyoming in order to change his voting registration back to Wyoming. It is assumed that this was done in an attempt to either meet or finesse the strict language of the Twelfth Amendment to the U.S. Constitution.

7. At the time of his change of voter registration, Cheney took no other action to indicate that he was abandoning his legal residence in the state of Texas and taking up actual inhabitance in the state of Wyoming. Cheney did not move into a new primary residence in the state of Wyoming, Cheney did not commence either full or part-time employment in the state of Wyoming, and upon completing his change of voter registration, Cheney returned to his primary home in Dallas, which remained his primary residence throughout the duration of the presidential campaign, and has remained so even to this date. Furthermore, Cheney has maintained the state homestead exemption on his Texas residence throughout the date of the presidential election, as is specifically provided for under Texas law to Texas residents only, which further confirms his status as both a resident as well as inhabitant of the state of Texas.

8. While "residence" may be an issue of legal intent in the mind of

the individual citizen, "inhabitance" most certainly is not. While Cheney may, by changing his voter registration to the state of Wyoming, have intended to change his legal residence from Texas to Wyoming, such action could not in any logical, rational or "common sense" way be viewed as having changed his ongoing status as an "inhabitant" of the state of Texas. Clearly, at the time of the election on November 7, 2000, under any rational view of the definition of the word, Cheney was an inhabitant of the state of Texas, and of no other state.

9. *Black's Law Dictionary (Revised 4th Edition 1968)* defines "inhabitant" as "one who resides actually and permanently in a given place and has his domicile there." But the terms "residence" and "inhabitant" also have been held not synonymous, the latter implying a more fixed and permanent abode than the former, and imparting privileges and duties to which a mere resident would not be subject. See *Tazewell County v. Davenport,* 40 Ill. 197, *State to Use of Knox County Collector v. Bunce,* 187 Mo. App. 607, 173 S.W. 101, 102.

10. The U.S. Supreme Court itself ruled on the specific issue of "inhabitancy" versus "residency" in a unanimous ruling just eight years ago in Barbara Franklin, Secretary of Commerce, et al. v. Massachusetts,112 S. Ct. 2767, 120 L.Ed. 2d 636, 60 U.S.L.W. 4781 (1992). In the case, for only the second time since 1900, the Census Bureau allocated the Department of Defense's overseas employees to particular States for reapportionment purposes in the 1990 census, using an allocation method that it determined most closely resembled "usual residence", its standard measure of state affiliation. Appellees

Massachusetts and two of its registered voters filed an action against, inter alios, the President and the Secretary of Commerce, alleging, among other things that the decision to allocate federal overseas employees is inconsistent with the Administrative Procedures Act (APA) and the Constitution. The District Court held, inter alia, that the Secretary's decision to allocate such employees to the States was arbitrary and capricious under APA standards and directed the Secretary to eliminate them from the apportionment count. The U.S. Supreme Court saw fit to reverse in an unanimous opinion written by Justice O'Connor, which found that the "Secretary's allocation of overseas federal employees to their home states is consistent with the constitutional language and goal of equal representation."

11. In upholding the allocation of the overseas federal employees to their home states, the Court held that, "It is compatible with the standard of *usual residence*, which was the gloss given the constitutional phrase in each State by the first enumeration Act and which has been used by the Bureau ever since to allocate persons to their home states. The phrase ("usual residence") may mean more than mere physical presence, and has been used to include some element of allegiance or enduring tie to a place. The first enumeration Act also used usual place of abode, "usual resident", and "inhabitant" to describe the required tie. And "inhabitant" in the related context of congressional residence qualifications, Art. I, Section 2, has been interpreted to include persons occasionally absent for a considerable time on public or private business."

12. Applying this reasoning to the facts of the Cheney case, we

discover two distinct physical relocations which have occurred during the public and private life of Dick Cheney, which are strikingly different when viewed under the context of the analysis in Franklin. The first relocation occurred when Dick Cheney was elected to the U.S. House of Representatives from the state of Wyoming in the late 1970's, and physically relocated from the state of Wyoming to the Washington, D.C. area. Clearly, while Cheney had physically relocated to the Washington, D.C area during this period of representation, he remained a Wyoming resident in every sense of the word. Obviously, as the sole representative to the House from the state of Wyoming, Cheney maintained significant ties to the state and was aggressively representing the state's interest in Congress. And when Cheney left the U.S. House of Representatives to assume the position as the U.S. Secretary of Defense in the Bush Administration in 1989, he also clearly maintained his Wyoming residency as he was most certainly continuing to represent the interests of the state in his new position.

13. Which brings us to the second physical relocation of Dick Cheney, which occurred after the election of President Clinton in late 1992, and the subsequent change in Presidential administrations. Upon leaving his position as U.S. Secretary of Defense, Cheney did not decide to permanently put down roots in the state of Wyoming. Instead, Cheney moved to the state of Texas, settling in Dallas, where he eventually accepted a high-level executive position with the Halliburton Corporation, an petroleum engineering services concern, whose headquarters is located in Dallas. And in 1995, Cheney and his wife, Lynne, purchased an estate home in the upscale Dallas neighborhood of Highland Park.

14. During the period of time between 1993 and 2000, while Cheney clearly was a resident and inhabitant of the state of Texas, he cannot be viewed as having been acting on behalf of the state of Wyoming in either a public or a private capacity. As far as we know, Cheney's employment with Halliburton did not require him to spend any significant amount of time within the state of Wyoming. Quite the contrary, Cheney's employment with Halliburton required him to spend a considerable amount of time in the Middle East, where Halliburton maintained a number of overseas offices. In fact, any time which Cheney did spend in the state of Wyoming between the years of 1993 and 2000 was spent on leisure and vacation type activities. And while Cheney may have maintained a second vacation home in the Jackson Hole, Wyoming area during some of this period of time, there can be no doubt that said vacation home did not constitute his primary residence.

15. Viewed under the analysis in Franklin then, Cheney's first relocation to Washington, D.C. in the late '70's to represent Wyoming in Congress clearly met the standard of being "occasionally absent for a considerable time on public or private business", and Cheney never actually intended to forsake his Wyoming residency for that of either the District of Columbia , where he worked, or the state of Virginia, where he lived.

16. However, viewed under the same analysis, Cheney's second relocation to Texas in the early '90's, simply did not meet that same standard. Upon relocating to Texas, Cheney registered to vote in Texas, registered his automobiles in Texas, obtained a State of Texas Driver's License, and applied for

and was granted a Texas State Homestead Exemption on his home in Dallas. In short, Cheney availed himself of every possible benefit of being a resident of the state of Texas, and in so doing, intentionally and knowingly severed both his resident and inhabitant relationship previously in effect with the state of Wyoming.

17. So having severed his relationship as a resident and inhabitant of the state of Wyoming, and having clearly established the same with the state of Texas through at least July, 2000, the question thus arises, what actions must Cheney have undertaken since July, 2000 in order to clearly reestablish both residency and inhabitancy within the state of Wyoming under the Franklin standard. Once again, the unanimous decision in Franklin provides us with clear advice and direction on the issue.

18. In the Franklin case, the Census Bureau decided to allocate the Department of Defense's overseas employees to the States based on their "*home of record*". It chose the home of record designation over other data available, *including legal residence,* and last duty station, because "home of record" most closely resembled the Census Bureau's standard measure of state affiliation—"usual residence". Franklin at P. 25 (italics added). Clearly then, were Dick Cheney an overseas employee of the federal government, the mere fact that he might have changed his voter registration less then four months before the Presidential election in a attempt to achieve legal residency in Wyoming, the U.S. Census Bureau, applying the standard approved by the unanimous Court in Franklin, would have most certainly allocated Cheney to the state of Texas.

Since Cheney obviously changed his voter registration for the express purpose of legally validating his possible election to the office of Vice-President of the U.S., a position of domestic, and often times, overseas federal employment, why should not Cheney be held to that same standard as the U.S. Census Bureau applied so simply and effectively in Franklin. That same standard which ended up passing muster with all nine Justices of the Court.

19. Before we leave our review of the Supreme Court's holding in Franklin, particular attention should be given to an actual example which the Court made special note of in its opinion. In the related context of congressional residence qualifications, U.S. Const. Art. I, Section 2, James Madison interpreted the constitutional term "inhabitant" to include "persons absent occasionally for a considerable time on public or private business." 2 Farrand, Records of the Federal Convention of 1787, at 217.. This understanding was applied in 1824, when a question was raised about the residency qualifications of would-be Representative John Forsyth, of Georgia. Mr Forsyth had been living in Spain during his election, serving as minister plenipotentiary from the U.S. His qualification for office was challenged on the ground that he was not an inhabitant of the State in which he was chosen. U.S. Const. Art. I, Section 2, Clause 2. The House Committee on Elections disagreed, reporting that "there is nothing in Mr. Forsyth's case which disqualifies him from holding a seat in this House. The capacity in which he acted, excludes the idea that, by the performance of his duty abroad. he ceased to be an inhabitant of the U.S., and if so, inasmuch as he had no inhabitancy in any part of the Union than Georgia, he

must be considered as in the same situation as before the acceptance of the appointment." M. Clarke & D Hall, Cases of Contested Elections in Congress 497-498 (1834). The Forsyth example makes it all crystal clear, during Cheney's first relocation from Wyoming to Washington in the late 1970's and all of the 1980's, he retained his status as both a resident and inhabitant of the state of Wyoming, while during Cheney's second relocation to the state of Texas in the early 90's, he did not

20. The U S. Supreme Court has consistently recognized that while new citizens must have the same opportunity to enjoy the privileges of being a citizen of a State, the States retain the ability to use bona fide residence requirements to ferret out those intend to take the privileges and run. As the Court explained in Martinez v. Byrum, 461 U.S. 321, 328-329 (1983), " A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents....a bona fide residence requirement simply requires that the person establish residence before demanding the services that are restricted to residence. The Martinez Court explained that "residence" requires "both physical presence and an intention to remain, and approved a Texas law that restricted eligibility for tuition-free education to families who met this minimum definition of residence." See Martinez at 332-333.

21. Citing the Martinez case in his dissent in Saenz, Director, California Department of Social Services v. Roe, 526 U.S. 489 (1999), Justice Rehnquist stated that, "While the physical presence element of a bona fide

residence is easy to police, the subjective intent element is not. It is simply unworkable and futile to require States to inquire into each new resident's subjective intent to remain. Hence, States employ objective criteria such as durational residence requirements to test a new resident's resolve to remain before these new citizens can enjoy certain in-state benefits. Recognizing the practical appeal of such criteria, this Court has repeatedly sanctioned the State's use of durational residence requirements before new residents receive in-state tuition rates at state universities." Saenz at P. 103. See also Starns v. Malkerson, 401 U.S. 985 (1971). The Court has done the same in upholding a 1-year residence requirement for eligibility to obtain a divorce in state courts. See Sosna v. Iowa, 419 U.S. 393, 406-409 (1975).

22. Under the state residency statutes of the state of Wyoming, as of this date and in any event, until no earlier than July, 2001, Dick Cheney cannot run for statewide elective office, cannot obtain in-state tuition at a public university, and cannot even obtain a Wyoming state fishing and hunting license. Indeed, the mere fact that Cheney has availed himself of the benefits of residency of another state, i.e. Texas, within the past year, makes it legally impossible for him to hold himself out as a true and "de jure" legal resident of the state of Wyoming. See W.S. Section 22-1-102. Perhaps the most interesting question we would ask of Cheney, in light of the above analysis however is this. In the event that he should lose the race for Vice-President of the U.S., does he already have permanent employment lined up within the state of Wyoming? Has he already moved the majority of his and his wife's personal possessions and

furnishings to his house in Jackson Hole, Wyoming? Or in the event that he should fall short in his quest for the Vice-Presidency, is it not more likely that Cheney simply intends to return to Dallas and return to his former life as a petroleum engineering corporation executive than it is that he intends to take up permanent residence in the state of Wyoming?

23. The Twelfth Amendment is clear that one of the candidates, either the candidate for President or the one for Vice-President, must be an inhabitant of a different state than that of any particular state's electors. In the case of Texas, that constitutional requirement has clearly not been complied with. Both George W. Bush and Dick Cheney are, under any rational definition of the term, "inhabitants" of the state of Texas, and were so on November 7, 2000, and as such, under a proper reading and construction of the Twelfth Amendment, they cannot be entitled to receive the thirty-two (32) electoral votes of the state of Texas. Furthermore, the Secretary of State of the State of Texas should not be allowed to certify the Texas slate of electors in favor of George W. Bush and Dick Cheney.

24. In truth, the mere fact that Cheney dashed to Wyoming shortly before being announced as the prospective Vice-Presidential nominee of the Republican Party this past June in order to change his voter registration is highly indicative of the fact that he was well aware of the requirement as set out in the Twelfth Amendment, and was attempting to finesse said requirement. However, a good faith attempt to so comply does not necessarily equate with actual and legally sufficient compliance. Given that the stakes could not possibly

be higher, it would seem that the standard for "inhabitance" for purposes of substantive compliance with the Twelfth Amendment should be much higher than that required to evidence mere "residence".

25. It is interesting to note that in this extremely close and controversial election, where there is the distinct possibility that one candidate for President may receive a plurality of the popular vote while the other receives a majority of the electoral votes, each of the candidates have pledged their unswerving fealty and fidelity to the ongoing validity of the Electoral College system, and to those specific provisions of the United States Constitution and the Amendments thereto, which provide for its employment in determining which candidate has won the election. Clearly, if the Constitution is to be followed to the letter of the law, and not circumvented by an obvious attempt to cleverly finesse its provisions, which were created with great forethought by our nation's "Founding Fathers", then George W. Bush and Dick Cheney cannot be allowed to receive the thirty-two electoral votes of the state of Texas. We are, at our core, a nation of laws, and no law can be any more sacrosanct than that of the U.S. Constitution and the Amendments thereto.

WHEREFORE, Lawrence A. Caplan, on behalf of both himself and the Concerned Citizens for the Upholding of our National Constitution (CCFC) respectfully ask this Court to accept and review this Amicus Curiae brief, and to incorporate the legal arguments and authorities set out herein in its final decision as to the merits of the action before this Honorable Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have delivered a true and correct copy of the above legal pleading to WILLIAM K. BERENSON, ESQ., 1701 River Run, Suite 900, Fort Worth, Texas 76107 (Attorney for Plaintiffs), and to Harriet E Miers, Esq., Locke, Liddell & Sapp, LLP, 2200 Bass Avenue, Suite 2200, Dallas, Texas 75201 (Attorney for Defendant, George W. Bush), and Andy Taylor, Deputy Attorney General of the State of Texas, 1019 Brazos Street, Room 214, Austin, Texas 78701, on this 27 day of November, 2000.

LAWRENCE A. CAPLAN, ESQ., and Concerned Citizens for the Upholding of our National Constitution
2200 Corporate Drive, Suite 314
Telephone: 561.988.6009
Facsimile: 561.982.7074
Florida Bar No 400531
E-Mail: Intltaxcorplaw@aol.com